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FACSIMILE TRANSMITTAL SHEET

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Date: July 11, 2003

Time:

D liver To: Alesia M. Brown

From: David W. Rouille

Company: US PTO - Office of Petitions

Facsimile Number: 703-308-6916

Telephone Number: 703-305-0310

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PETITIONS OFFICE

MESSAGE

Re: Application No.: 09/911,216

Filed On: July 23, 2001

Dear Alesia Brown,

As you discussed with my assistant, Cara Egan, attached is a copy of the executed Oath and Declaration. Also attached is a copy of your notice of petition dismissal we recently received. Please call me if you have any questions or concerns.

David W. Rouille
Dave Rouille

STATEMENT OF CONFIDENTIALITY

The documents included with this facsimile transmittal sheet contain information which is confidential and/or privileged. The information is intended to be for the use of the addressee named on this transmittal sheet. If you are not the addressee, note that any disclosure, photocopying, distribution or use of the contents of this faxed information is prohibited. If you have received this facsimile in error, please notify us by telephone (collect) immediately so that we can arrange for the retrieval of the original documents at no cost to you.

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Client Matter No.: EMPIR-024AUS



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JUN 23 2003

DALY, CROWLEY & MOFFORD, LLP
SUITE 101
275 TURNPIKE STREET
CANTON, MA 02021-2310

In re Application of
Foulger, et al.
Application No. 09/911,216
Filed: July 23, 2001
Attorney Dkt. No. EMPIR-024AUS
For: METHOD OF BACKTRACING
NETWORK PERFORMANCE

OFFICE OF PETITIONS

DECISION REFUSING
STATUS UNDER 37 CFR
1.47(b)

This decision is in response to the renewed petition under 37 CFR 1.47(b), filed May 14, 2003.

The petition is **DISMISSED**.

Rule 47 applicant is given TWO MONTHS from the mailing date of this decision to reply, correcting the below-noted deficiencies. Any reply should be entitled "Request for Reconsideration of Petition Under 37 CFR 1.47(b)," and should only address the deficiencies noted below, except that the reply may include an oath or declaration executed by the non-signing inventor. Failure to respond will result in abandonment of the application. Any extensions of time will be governed by 37 CFR 1.136(a).

The above-identified application was filed July 23, 2001 without an executed oath or declaration and naming Davis Foulger, John Esposito, William Babcock, Robert McElhaney, and William Minckler as joint inventors. Accordingly, on August 24, 2001, a Notice to File Missing Parts of Application was mailed, requiring, among other items, an executed oath or declaration, and a surcharge for its late filing. A petition under 37 CFR 1.47(b) was filed January 7, 2002 and dismissed March 4, 2003.

A grantable petition under 37 CFR 1.47(b) requires: (1) proof that the non-signing inventor cannot be reached or refuses to sign the oath or declaration after having been presented with the application papers (specification, claims and drawings); (2) an acceptable oath or declaration in compliance with 35 U.S.C. §§ 115 and 116; (3) the petition fee; (4) a statement of the last known address of the non-signing inventor; (5) proof of proprietary interest; and (6) a showing that such action is required to preserve the rights of the parties or to prevent irreparable damages.

Petitioner lacks item (2) set forth above. An oath or declaration for the patent application in compliance with 37 CFR 1.63 has not been presented. Please note that a declaration signed by one other than a named inventor should be executed by a corporate officer, such as the president, vice president, secretary, or treasurer on behalf of and as

Application No. 09/911,216

agent for the non-signing inventors. The corporate officer's title and address must be identified in the declaration. If an officer is unavailable to execute the declaration, the declaration may be signed on behalf of the corporation by one whose proof of signing authority has been submitted to the Office, such as the corporation's attorney. See, MPEP 409.03(b). Any renewed petition must be accompanied by a declaration in full compliance with 37 CFR 1.63.

While petitioner has provided a declaration, the declaration is not executed. David W. Rouille states he is "authorized to sign the present oath on behalf of Empirix, Inc.," however, a declaration rather than an oath has been presented. Moreover, Mr. Rouille has not executed the document. It is also worth noting that the inventor's are misnumbered on the document wherein John Esposito and William Babcock are both designated as the fourth joint inventor.

Further correspondence with respect to this matter should be addressed as follows:

By mail:

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By facsimile:

(703) 308-6916

By hand:

Office of Petitions
2201 South Clark Place
Crystal Plaza 4, Suite 3C23
Arlington, VA 22202

By delivery service:
(FedEx, UPS, DHL, etc.)

U.S. Patent and Trademark Office
2011 South Clark Place
Customer Window, **Mail Stop Petition**
Crystal Plaza Two, Lobby, Room 1B03
Arlington, VA 22202

Telephone inquiries regarding this decision should be directed to the undersigned at (703) 305-0310.

Alesia M. Brown
Petitions Attorney
Office of Petitions
Office of the Deputy Assistant Commissioner
for Patent Policy and Projects